

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.891 of 1990

1. Mustafa Shahadal Shaikh
2. Shahadal Hamidso Shaikh
3. Najamum Shadal Shaikh

All residents of Ujalawadi,
Taluka Karveer,
Dist. Kolhapur

Appellants

Vs.

State of Maharashtra

Respondent

Mr.Ganesh Gole for appellants.
Mr.D.P.Adsule, APP for State.

CORAM: B.H.MARLAPALLE, J.

Reserved on: October 26, 2007.
Pronounced on: November 28, 2007.

JUDGMENT

1. This appeal arises from the order of conviction and sentence passed in Sessions Case No.7 of 1990 by the learned 4th Addl. Sessions Judge at Kolhapur. The accused - appellants came to be convicted for the offences punishable under Sections 498-A and 304-B read with Section 34 of IPC and have been sentenced to suffer RI for seven years under Section 304-B and for one year and to pay a fine of Rs.1000/- in default to suffer RI for six months under Section 498-A of IPC. On admission of appeal they were released on bail as per the order dated

19/12/1990. The learned counsel for the appellants has submitted that appellant nos.2 and 3 are no more and death certificates issued by Kagal Municipal Council in respect of appellant no.3 and by the Kolhapur Municipal Corporation in respect of appellant no.2 are placed on record. Hence this appeal survives only against the appellant no.1 - original accused no.1.

2. Marriage of the appellant no.1 with deceased

Hasina - daughter of PW 6 - Dilawar Pathan and PW 7 - Chandbi took place on 26th January 1989. She was staying with the accused in her matrimonial home at village Ujalawadi. On 23/8/1989 while she was at her matrimonial home, she was taken to the CPR Hospital at Kolhapur and the doctor found that she was not alive. PW 1 on receiving the message that his grand-daughter - Hasina (daughter's daughter) was taken to the CPR Hospital, reached along with his wife on the same day at Kolhapur and found that his grand-daughter was dead. He filed FIR (Exhibit 20) on the same day and alleged that the deceased was tortured and harassed by the accused on account of demand of golden chain, golden ring and cash amount of Rs.5000/- and on that count she committed suicide.

The accused were taken in custody. The FIR was lodged at 9.50 p.m. Inquest Panchanama was drawn and A.D.No.83/1989 was recorded. However, on the complaint of PW 1, C.P.No.186/89 was registered at 9.50 p.m. for the offences punishable under Sections 306, 304-B and 498-A read with Section 34 of IPC. PW 5 Dr. Ramdas Mane conducted the post mortem and submitted his report at Exhibit 22. The cause of death was reserved. However, on receiving the CA report at Exhibit 23 the cause of death was stated to be poisoning and the accused nos.1 and 2 were taken in custody on 24/8/1989. Charge-sheet was submitted on completion of the investigation on 16/11/1989 and charges were framed on 6/9/1990 at Exhibit 2.

3. During the trial the prosecution examined as many as 12 witnesses and five of them are the near relations of the deceased i.e. PW 4 Abdulrahim Shaikh - Grandfather, PW 6 - Dilawar Pathan - father, PW 7 - Chandbi Pathan - mother, PW 8 Hawabi Shaikh - grandmother, and PW 9 - Ayubkhan Pathan - brother. PW 1 - Afzal Zari was the panch witness for the inquest panchanama at Exhibit 14. PW 2 - Munid Naikwadi and PW 3 - Narayan Mane were panch witnesses for the scene of offence and both of them turned

hostile. PW 5 is Dr. Ramdas Mane who performed the post-mortem. PW 10 Abubakr Nimsikari was the mediator to fix the marriage of the deceased with the accused no.1. PW Nos.11 and 12 were the police personnel.

4. Exhibit 34 is the intimation given in writing by the Medical Officer, CPR Hospital to the Police Inspector, Police Station, Kolhapur informing that Smt. Hasina Mustafa Shaikh was brought to the hospital when she was already dead and this intimation was sent at about 10 a.m. on 23/8/1989. This document shows that the dead body of the deceased was taken to the hospital at Kolhapur before 10 a.m. on 23/8/1989 and obviously by the accused. The post-mortem report states that the death could have occurred six hours after the last meal and, therefore, it could be easily inferred that the administration of poison which was the cause of death could have been any time after the midnight and the accused persons had seen Hasina dead in the early hours of 23/8/1989. The evidence of PW 5 Dr. Ramdas Mane does not clearly lead to any conclusion whether Hasina died a suicidal death or a homicidal death but the Doctor was clear in his evidence that it was not

an accidental death. The prosecution appears to have not acted diligently in probing further as to whether the cause of death could be ascertained as homicidal or suicidal, but certainly the death occurred otherwise than under normal circumstances within seven years of her marriage. The trial Court held that the prosecution had proved beyond doubt that the accused had subjected the deceased to cruelty and harassment for demand of money and gold ornaments, individually or in furtherance of their common intention and thus held the accused guilty for the offence punishable under Section 498-A read with Section 34 of IPC. It further held that death of Hasina had occurred within few months of marriage which is so obvious and thus otherwise than under normal circumstances within seven years from her marriage. It has been further held that soon before her death the deceased was subjected to cruelty and harassment by the accused individually or in furtherance of their common intention in connection with the demand for money and gold ornaments and, therefore, convicted them under Section 304-B read with Section 34 of IPC. As of now it is necessary to examine the challenge to the said order of conviction and sentence only in respect of accused no.1 -

appellant no.1 and the appeal stands abated against
appellant nos.2 and 3.

5. The learned counsel for the accused submitted that not a single independent witness was examined by the prosecution and the rickshaw driver in whose rickshaw the accused had taken the deceased to the CPR hospital could have thrown some light and he was not examined, though his statement in the course of investigation was recorded. Another person by name Ashok was a neighbour and who had informed the rickshaw driver about the unconsciousness of Hasina was not examined by the prosecution and, therefore, it cannot be said that the prosecution established its case beyond reasonable doubt, as per the learned counsel. It is further submitted that there was no external injury on the body of the deceased and it has contradicted the depositions of the witnesses that the deceased was beaten by the accused persons. There was no letter or suicide note by the deceased from which it could be inferred that the deceased had committed suicide due to the harassment or cruelty meted out to her by the accused persons. Not a single independent witness who could have noticed any such instances was examined and, therefore, the

prosecution case was unreliable, claims the defence. It is further submitted that the prosecution did not prove that the deceased was driven to commit suicide because of any acts of harassment or cruelty at the hands of the accused or any one of them and in this regard reliance has been placed on the decision in the case of Surest Pharande Vs. State of Maharashtra **1997 V LJ 355**]. By relying upon another decision of this Court in the case of Shivaji Patil and ors. Vs. State of Maharashtra **[2004 All MR (Crime) 36]** it has been urged that for bringing home guilt under Section 498-A or Section 304-B of IPC it was necessary for the prosecution to bring specific evidence to show that the deceased was harassed, ill-treated on number of occasions and, therefore, the appeal deserves to be allowed. The panchanama of place of occurrence i.e. the house of the accused is at Exhibit 16 which was brought on record through the evidence of PW 2 - Munid Naikwadi. Though he was declared hostile, he admitted that the distance between the house of the accused and his house was about 100 ft. he admitted that the panchanama was drawn in his presence and it was signed by him. He also admitted that the contents of the panchanama were correct. The panchanama shows that the house of the accused had

two bedrooms and kitchen and a seating room in addition to a separate bathroom. In the search carried out no poison was found in the house and the accused no.1 was present when the panchanama was carried out. The evidence clearly went to show that Hasina died in her matrimonial home and in the company of the accused. In their statement recorded under Section 313 of Cr.P.C. it was the defence of mere denial but none of the accused and more particularly accused no.1, did not state that Hasina did not die in the circumstances otherwise than normal. Coming to the conviction under Section 498-A and 304-B of IPC, it is necessary to mainly consider the evidence of PW 4 - Abdul, PW 6 - Dilwar Pathan, PW 7 - Chandbi, PW 8 - Hawabi, PW 9 - Ayubkhan and PW 10 - Abubakar, who is not a member of the family of the deceased from her paternal side. It has come in the evidence of PW 6 - Dilawarkhan, the father of the deceased that he was working in the Co-operative Department of Goa Government and has two sons - Ayubkhan and Asifkhan. Ayub was residing in the house of his grand-father PW 4 whereas Asif was staying at Goa. Hasina was married on 26/1/1989 to accused no.1 at Tembalewadi i.e. near the house of PW 4. At the time of Bakri-Eid Hasina along with her

husband were with him at Goa and Hasina had told him during that stay that her husband, mother-in-law, father-in-law and sister-in-law had asked her to bring Rs.5000/-, gold chain and gold ring. He further stated that Hasina had informed him about the torture by her in-laws by beating her and keeping her starved. He also stated that he had told the accused no.1 during her stay that he did not have sufficient money and he should wait for some time and during that stay he had given a wrist watch to the accused no.1. Hasina stayed for 15 days but the accused along with Hasina's brother returned. On 18/8/1989 he and his wife PW 7 had come to Tambalwadi to the house of PW 4 and then they went to the house of the accused at Ujlaiwadi. At that time Hasina and her father-in-law were present in the house. Hasina told him that in-laws again tortured her and asked him to make arrangement for satisfaction of their demand. Thereafter he along with his wife returned to Tambalwadi and sent his son to bring Hasina to Tambalwadi. Hasina came and started crying and told him that the accused tortured her more. On the next day morning Hasina's husband and his mother came to Tambalwadi. He told Hasina's husband, he would get employment but he should not harass Hasina and the

accused left the house. Thereafter he requested his father-in-law PW 4 to pay attention to Hasina and he went to Goa. In his cross-examination he admitted that it was an arranged marriage and he had given gifts in the marriage. After marriage Hasina had come to his house in Goa in June 1989. He stated that Hasina had told him about the demand and torture by the accused in the presence of his wife and her husband was not present at that time, though accused was staying with them at Goa. He had brought the wrist watch from Russia and he had cash memo of the same. He reiterated that when he had gone to the house of Hasina, she had told him about the torture and the family of the accused consisted of only four members. He denied the suggestion that the accused never demanded anything. The evidence of PW 6 is supported by the evidence of PW 7 as well as PW 10 regarding Hasina's disclosures to PW 6 about the ill-treatment, torture, demand of Rs.5000/-, gold ring and gold chain by all the accused. In her cross-examination this part of the evidence remained unshattered. Both these witnesses also deposed before the trial Court that some more instances of torture and harassment on account of demand of money by the accused were made known to them through PW 4.

PW 7 admitted that PW 11, the mediator for settlement of the marriage of Hasina was not informed by her against the accused. She also admitted that she did not write any letter to her father informing the ill-treatment and harassment caused by the accused to Hasina nor did Hasina send any letters to her.

6. PW 10, brother of the deceased gave a specific instance told to him by Hasina. As told by his parents, when he brought Hasina from her matrimonial home on 18/8/1989, she had told him that her in-laws used to keep her starved for demand of gold chain, gold ring and Rs.5000/-. She had also told him that her in-laws used to beat her and that her husband, mother-in-law and father-in-law tortured her. On the next day Hasina's husband and mother-in-law had come to his house and his father - PW 6 had tried to persuade Mustafa saying that he would arrange for employment of Mustafa and Mustafa did not talk anything and left his house. This testimony was tried to be impeached in the cross-examination by the defence by asking him as to why the same did not find place in his statement recorded by the police in the course of investigation and the witness reiterated that he had stated the same including the instances

of torture, harassment and starvation to the deceased. It would be pertinent to note in this regard the cross-examination of PW 12 - Sukhadeo Chougule who was the Investigating Officer and he stated before the trial Court,

"I recorded statement of Ayubkhan. The witness has stated before me that, Hasina's husband, mother-in-law and sister-in-law tortured to Hasina for demand of gold ornaments and cash."

It would not be out of place to also note that PW 12 in his examination-in-chief stated before the trial Court that on 26/8/1989 after he received the PM notes he enquired with the accused as well as tried to trace the bottle of poison from the house of the accused but the same was not found on 28th August 1989 despite of search.

7. In order to convict an accused for an offence punishable under Section 304-B of IPC the following essentials must be satisfied

(a) the death of a woman must have been caused

by burns or bodily injury or otherwise than
under normal circumstances;

(b) such death must have occurred within seven
years of her marriage

(c) soon before her death, the woman must have
been subjected to cruelty or harassment by her
husband or by relatives of her husband; and

(d) such cruelty or harassment must be for or
in connection with demand of dowry.

. It is only when the aforementioned ingredients
are established by acceptable evidence such death
shall be called "dowry death" and such husband or his
relative shall be deemed to have caused her death.
In the case of an offence punishable under Section
304-B of IPC an exception is made by a deeming
provision as to nature of death as "dowry death" and
that the husband or his relative, as the case may be,
is deemed to have caused such death, even in the
absence of evidence to prove these aspects but on
proving the existence of the ingredients of the said
offence by convincing evidence. Under Section 4 of

the Evidence Act whenever it is directed by the said Act that the Court shall presume the fact, it shall record such fact as proved unless and until it is disproved. The Court has no option but to presume the accused have caused dowry death unless the accused disproved it. It is a statutory compulsion on the Court. However, it is open to the accused to adduce such evidence for disproving such compulsory presumption as the burden is unmistakably on him to do so and he can discharge that burden either by eliciting answers through cross-examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both. Section 113-B of the Evidence Act is also relevant while examining the charge under Section 304-B of IPC as the said Section deals with the presumption as to the dowry death.

8. In the instant case it would be necessary to examine whether the accused are responsible for the dowry death of Hasina and while doing so it is also to be kept in mind that the conjoint reading of Section 113-B of the Evidence Act and Section 304-B of IPC states that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to

rule out the possibility of natural or accidental death so as to bring it within the purview of death "occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B of IPC are pressed into service. As noted earlier, the prosecution has proved that the death of Hasina was neither natural nor accidental. The trial Court has rightly disbelieved the evidence of PW 8 - Hawabi and PW 10 - Abubakr, having regards to the depositions of PW 12 - I.O. in his cross-examination. However, the evidence of PW 4, PW 6, PW 7 and PW 9 clearly shows that after Hasina was married to the accused - Mustafa on 26/1/1989, soon thereafter her harassment and torture for the demand of Rs.5000/- and gold ornaments started at the hands of the accused and just before her death on 23/8/1989, the witnesses have given the specific instances of harassment, torture and ill-treatment to Hasina at the hands of the accused including accused - Mustafa on 18/8/1989 in the presence of PW 6 and PW 7 and on the next day in the presence of all the four witnesses. The harassment, torture and ill-treatment caused to the deceased was on account of demand of Rs.5000/- and gold ornaments. Hasina died in her

matrimonial home and the evidence led by the prosecution makes a case beyond reasonable doubt to believe that she died after the midnight while in the company of Mustafa. As has come on record, the matrimonial home has two separate bed-rooms and there were only four members in the said house at the relevant time i.e. Hasina and the three accused. Before the trial Court, the defence had tried to make out a case that FIR was lodged with inordinate delay and the same was discarded by the trial Court on the ground that the FIR was lodged at about 9.50 p.m. on 23/8/1989 itself by PW 4

9. On the point of sentence, the trial Court could not have awarded the sentence of RI for less than seven years for the offence punishable under Section 304-B of IPC and it declined to take any lenient view in awarding the sentence for the offence punishable under Section 498-A of IPC. There is no appeal filed by the State for enhancement of sentence under any of the charges and, therefore, I am satisfied that the order of conviction as well as sentence passed by the trial Court and impugned in this appeal deserves to be confirmed.

10. In the premises, the appeal stands abated, so far as appellant nos.2 and 3 (accused nos.2 and 3) are concerned. The appeal is dismissed and the order of conviction and sentence passed against accused no. 1 - Mustafa Shahadal Shaikh by the learned 4th Addl. Sessions Judge at Kolhapur in Sessions Case No.7 of 1990 is hereby confirmed. Accused - Mustafa to surrender forthwith to undergo the sentence and he will be entitled for set off, if any, under Section 428 of Cr.P.C. The bail of accused no.1 granted earlier stands cancelled.

(B.H.MARL